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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-482

JOHN C. GRECO
Petitioner

v.

ORANGE MEMORIAL HOSPITAL CORPORATION, ET AL.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ORANGE MEMORIAL HOSPITAL CORPORATION, D.B. CAMPBELL, B.W. BRIGGS, T.O. CHARLTON, N.A. ADAMSON, FRANK W. HUSTMYRE, S. MALCOM VAUGHAN, JOHN MAGNESS, RICHARD E. JACKSON, Individually and as Members of the Board of Directors of Orange Memorial Hospital Corporation; JAMES P. CLOUD, D.H. POLLOCK, GEORGE L. EASTMAN, Jr., CHARLES CRIM, HOWARD C. WILLIAMS, WILBUR R. CLEAVES, ROBERT C. KEE, JOHN E. BARNES, OSCAR R. GRIFFIN, DAVID BENNETT, R.A. INGRAM, C.B. SHADDOCK, HOMER C. STUNTZ, R.J. FISETTE, M.F. HARRIS, Individually and as Members of the Medical Staff of Orange Memorial Hospital; JAMES B. JONES, Individually and as a Member of the Board of Directors of Orange Memorial Hospital Corporation and as a Member of the Medical Staff of Orange Memorial Hospital; BESS B. SCHOFIELD, Individually and as Orange Memorial Hospital Administrator; and the COUNTY COMMISSIONERS OF ORANGE COUNTY, TEXAS

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioner, John C. Greco, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 29, 1975.

Opinion Below

The opinion of the Court of Appeals is reported at 513 F.2d. 873 and is reprinted in the appendix hereto. The opinion of the District Court for the Eastern District of Texas is printed at 374 F.Supp.227.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 29, 1975. A timely petition for rehearing *en banc* was denied on June 26, 1975. (515 F.2d.1183), and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

I. Whether the actions of a hospital medical staff and board of directors which deny access to a staff doctor and his patients for the purpose of performing abortions constitute "state action" or "action under color of state law" when the hospital was built on county property, using county funds, is owned by the county and is leased by the county to a non-profit corporation for one dollar a year.

II. Whether the trial court erred in dismissing the cause of action against those defendants who are members of the medical staff of Orange Memorial Hospital and whose decision to forbid the performance of abortions within the hospital was adopted by the hospital board of directors.

Statutory Provisions Involved

United States Code Title 42:

Section 1983 Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case

The facts of this case have never been seriously disputed. In 1954 the voters of Orange County, Texas authorized the issuance of $1,762,000.00 in hospital bonds. This money was combined with a Hill-Burton Grant of $1,250,000.00 and was used to erect the original hospital building on land which had been donated to Orange County by private individuals. In later years more land was donated to the County by private individuals and the county commissioners, without the explicit approval of the voters, issued approximately $670,000.00 worth of hospital time warrants so that additions could be made to the original building. The application for a hospital license and the application for Hill-Burton Funds was submitted by the County of Orange as owner and operator of the proposed hospital. In 1957, however, the County of Orange entered into a lease agreement with the Orange Memorial Hospital Corporation, a non-profit corporation. Under the terms of the lease, the County continued to own the land, the hospital buildings and the equipment within it. However, under the terms of the lease the corporation would take over the operation and maintenance of the hospital. The original lease was for five years, and has been renewed to this date. The payments under the lease are $1.00 per year. In order to retire the debt from the bonds and the time warrants, the citizens of Orange County pay 8 ½¢ of every tax dollar toward that purpose. The Corporation is exempt from all taxation and under the provisions of the lease agrees to the following: (1) to operate the hospital as a non-profit institution and to furnish to the general public medical and surgical care subject to such terms and regulations as the lessee may prescribe; (2) to carry out the assurances required of the lessor in order to obtain federal funds and to relinquish possession of the hospital in the event it fails to adequately comply; (3) to have all equipment and supplies inventoried, in a manner approved by lessor, and to dispose of worthless, damaged, or worn out equipment only with the prior approval of the Commissioners Court; (4) to be responsible for the expense of the day to day operation and maintenance of the hospital; (5) to make additions to the hospital with the written consent of lessor and at its own expense; (6) to keep all appropriate insurance in effect; (7) to submit an annual audit to lessor and to furnish any information which lessor feels is

necessary to inform the people of Orange County about the operation and financial condition of the institution; (8) to accept indigent patients certified by the lessor subject to the prior obligation to receive emergency cases. The lessee is given an option to purchase the hospital during the term of the lease and an unlimited option to renew the lease for additional 5 year periods as indicated earlier. The lessor reserves the right through its County Health Office to advise the lessee that an indigent is being kept in the hospital for a longer period of time than necessary, and that the lessor shall no longer be liable for expenses. The lessor-county specifically indicates in the lease that the lessee "has undertaken to relieve lessor of the responsibility and expense of operating a hospital."

The lessee-Orange Memorial Hospital Corporation was chartered as a non-profit, tax exempt, private corporation for the purpose of supporting charitable and educational undertakings including the operation and maintenance of the hospital, and the general promotion of the health of the community. The corporation consists of life and advisory members. Life membership is obtained by contributing $1000.00 to the corporation. Any citizen and qualified voter of Orange County who owns taxable property may become an advisory member by attending the annual meetings of the corporation. The direction and management of the affairs of the corporation is vested in the board of directors composed of 9 persons. Five members of the board must be life members and four members are elected from the advisory group.

It was conclusively established at the trial in the District Court and has never been seriously questioned that there are no practical or medical reasons for the hospital's refusal to admit elective abortion patients. Plaintiff has never asked any Court to require any individual doctor, nurse or other person to assist him in performing the elective abortions on his patients. The hospital has available beds and personnel and medical procedures almost identical in nature to elective abortions are regularly performed within the hospital.

Shortly after this Court's decision in the abortion cases in January of 1973, the Plaintiff admitted several of his patients for elective abortion procedures. The medical staff, consisting of all the doctors who held staff privileges at the hospital met and decided that the policy of Orange Memorial Hospital should be that elective abortions would not be allowed. The Board of

Directors of Orange Memorial Hospital Corporation adopted the decision of the medical staff and after that time, the Plaintiff's patients were refused admittance when he sought to admit them for purposes of an elective abortion. Plaintiff then filed suit in the United States District Court for the Eastern District of Texas, Beaumont Division, against the Corporation, the Board of Directors, the medical staff and the county commissioners of Orange County, all in their individual and official capacities. Plaintiff asked for declaratory and injunctive relief against the hospital's policies on behalf of himself and his patients and asked for monetary damages for the lost income he had suffered and the damage to his practice. The District Court also dismissed those Defendants who were members of the medical staff. After trial, the District Court entered a judgment dismissing the entire cause of action and issued a memorandum opinion in which the Court stated that the Plaintiff had standing to bring the suit, that were Orange Memorial Hospital a public hospital within the meaning of Title 42, Section 1983 that the hospital would have to admit patients for elective abortions but that Orange Memorial Hospital was in effect a private hospital for purposes of the Civil Rights Act and hence no cause of action was permissable under Title 42, Section 1983, United States Code. Plaintiff appealed to the United States Court of Appeals for the Fifth Circuit where the judgment of the District Court was affirmed. Although Plaintiff was appealing both the decision to dismiss the medical staff from the law suit and the decision that Orange Memorial Hospital is not a public hospital for purposes of 42 U.S.C. Sec. 1983, the Court of Appeals did not reach the question of the dismissal of the medical staff in its opinion. Plaintiff still maintains his position that the Defendants who are members of the medical staff should not have been dismissed since under the by-laws of the corporation it is at least open to dispute as to whether the medical staff or the board of directors has jurisdiction over purely medical matters within the hospital.

Reasons for Granting the Writ

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 42 U.S.C. Sec. 1983.

Since this Court stated in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961), that "only by sifting facts and weighing circumstances can a nonobvious involvement of the State in private conduct be attributed its true significance," the various courts of appeals have grappled uncertainly with situations involving government ownership or subsidy to entities operated by otherwise private groups. In dealing with hospitals, the courts of appeals have reached widely divergent results. This is most dramatically illustrated in the conflict between decisions of the Sixth Circuit and the Fifth Circuit in the present case. In *O'Neill v. Grayson County War Memorial Hospital*, 472 F.2d. 1140 (1973), the Sixth Circuit held that the due process provision of the Fourteenth Amendment was applicable to a hospital which is almost identical to the hospital in the present case. In *O'Neill*, hospital facilities were owned by the County and leased to a foundation for the sum of $1.00 per year. The foundation agreed to fulfill all duties and responsibilities incident to the maintenance and operation of the hospital and agreed to assume the obligations and agreements that the County governing body had made with the United States in securing Hill-Burton Funds. These provisions are identical to those contained in the lease between the County Commissioners of Orange County and the Orange Memorial Hospital Corporation in the present case. The only difference in the two cases is that while in *O'Neill* the agreement between the County and the Foundation required that the Board of Directors of the Foundation shall at all times contain at least one member from each of the County's magisterial districts; in the present case the agreement between the County and the Corporation provides that there shall be at least four directors of the Corporation elected from the members of the general public whose only qualifications are that they be qualified voters and own taxable property within the County.

The Fourth Circuit has required even less in finding state action where hospitals are concerned. In *Duffield v. Charleston Area Medical Center, Inc.* 503 F. 2d. 512 (1974) and in *Christhilf v. Anapolis Emergency Hospital Ass'n, Inc.*, 496 F.2d. 74 (1974) the Fourth Circuit held that where a hospital had received funds for capitol expenditures from the County and from the Hill-Burton program, action taken against a staff physician was action under color of state law.

In *Fortin v. Darlington Little League, Inc.*, 514 F. 2d. 344 (1975) the First Circuit found that the action of the Little

League organization in excluding girls was state action. This decision was reached in view of the fact that the Little League organization was granted almost exclusive use of city recreational facilities.

The Second Circuit's opinion in *Grafton v. Brooklyn Law School*, 478 F. 2d. 1137 (1973) indicates that while mere receipt of funds from a governmental entity would not be enough to place the action of an otherwise private organization within the realm of state action, that anything more would subject the entity to the requirements of the Fourteenth Amendment. In *Grafton*, the Court was dealing with a situation where the land for the Law School was obtained at an auction held by the City of New York which was restricted to non-profit organizations which planned to use the land to construct an educational facility. The Court held that this was not enough for purposes of 42 U.S.C. 1983, but that "we need not decide what the result would be if New York City had not only given the land, but constructed the buildings and leased them to the Law School, a situation that would demand consideration of how far *Burton v. Wilmington Parking Authority* 365 U.S. 715 (1961) applies beyond the area of racial discrimination." 479 F. 2d. 1142. In considering the situation now existing in Orange County where a pregnant woman desiring an abortion is forced to pay 8½¢ out of every tax dollar to the County for the retirement of the debt on the hospital and yet is excluded from the hospital, a footnote contained in *Grafton* is particularly appropope. "[There] is a peculiar offensiveness when citizens are required to pay taxes 'for purposes whence they or their children are excluded.'" 478 F. 2d. at 1142.

In reaching its decision the Fifth Circuit in the present case stated that there were two differences between the present situation and that found in *Burton* and other cases where state action had been found. First, the situation in the present case does not involve racial discrimination. None of the First, Sixth or Fourth Circuit opinions cited above involved racial discrimination. Second, the Fifth Circuit opinion relied heavily on the fact that the County in the present case did not seek to influence hospital policy as regards abortions. However, in none of the conflicting cases by other circuits did the governmental entity have any policy concerning the alleged constitutional infringement.

II. REVIEW AND REVERSAL OF THE DECISION BELOW IS NECESSARY TO EFFECTUATE THIS COURT'S DECISIONS IN ROE VS. WADE AND DOE VS. BOLTON.

In deciding the abortion cases this Court raised to the constitutional level of other rights guaranteed by the Fourteenth Amendment the right of a woman in consultation with her physician to have an abortion. However, as was established without objection at the trial in the District Court, before many women can exercise that Constitutional right, hospital facilities must be available. As the Plaintiff testified, many of his patients who are obese, have high blood pressure or other medical complications or who are very young, require the facilities of a complete hospital even when the abortion is performed in the first trimester. The Plaintiff further testified that the nearest hospital which would take abortion patients was 90 miles away in Houston, Texas and that the 90 mile trip would represent a hardship for many of his indigent patients.

No general study of hospital ownership and operation in Texas is available. However, the Texas State Department of Health, Hospital Licensing Division publishes a directory of the licensed hospitals of Texas. Out of 576 licensed hospitals in the state, 292 are owned or operated by corporations or non-profit associations. Another 50 hospitals are listed as being owned by churches. Even this is not a true reading of the number of hospitals available to those desiring elective abortions, since Orange Memorial Hospital is listed in the directory as being owned and operated by the County of Orange. It is not known how many hospitals are owned by some governmental entity and leased to a non-profit association. When one realizes that not all hospitals maintain obstetrical facilities and do all types of surgery, the facilities that are available to a woman and her doctor for use in carrying out her Constitutional right to have an abortion if she chooses are very limited indeed.

The Florida State Plan for Construction of Hospitals, published by the Division of Community Hospitals and Medical Facilities lists 353 hospitals. Of these 109 are owned by non-profit associations and 17 are owned by churches. All of these institutions have received or will receive state funds to aid them in construction of facilities.

Plaintiff does not have the resources to make a detailed study of the hospitals in every state. However, the statistics related above and the large number of cases involving hospitals which are operated by a private board of directors but receive substantial state aid indicate that the problem faced by the Plaintiff and his patients is a recurring one and one which has a great effect on the rights of those women who seek abortions.

This Court's decision on abortion, like its decision on desegregation, is extremely unpopular in some quarters of the nation. The decision of the Court below opens the opportunity for serious mischief on the part of local governments. The practice of turning over essentially governmental operations to private individuals in order to avoid the mandates of our Constitution has reached a high art following this Court's decisions in the area of desegregation. This Court has uniformly struck down such attempts. *Hall v. St. Helena Parish School Board*, 368 U.S. 515 (1962); *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Gilmore v. City of Montgomery, Alabama*, 417 U.S. 556 (1974). Constitutional rights do not exist in a vacuum. This Court should make it clear to governmental officials that they cannot avoid the difficult and sometimes unpopular decisions required by our Constitution simply by transferring facilities constructed with the tax dollars of citizens into so-called private institutions.

III. REVIEW IS NECESSARY IN ORDER TO SETTLE RECURRING PROBLEMS CONCERNING THE APPLICATION OF *BURTON VS. WILMINGTON PARKING AUTHORITY* BEYOND THE AREA OF RACIAL DISCRIMINATION.

It is obvious from the Fifth Circuit's opinion in this case that were Orange Memorial Hospital refusing to admit black people as patients, the Court would have found the requisite state action for purposes of 42 U.S.C. Section 1983. While it has for some time been evident to the students of the Federal Courts that many Courts of Appeal were applying a different standard depending on whether the Plaintiff was a member of a racial minority or was claiming some other Constitutional right, it has only been recently that the Courts have candidly expressed this double standard. It is expressed in the opinion of the Court below and is likewise expressed in *Doe v. Bellin Memorial Hospital*, 479 F. 2d. 756 (7th Cir. 1973); *Grafton v. Brooklyn*

Law School, 478 F. 2d. 1137 (2nd Cir. 1973) and *Ascherman v. Presbyterian Hosp. of Pac. Med. C.; Inc.*, 507 F. 2d. 1103 (9th Cir. 1974).

Other Courts have specifically refused to apply a double standard.

> "Whereas we are cognizant of the concern expressed in the *Place* opinion for the 'ever increasing attempts to get into Federal Court by labelling real or imagined wrongs as deprivations of civil rights' which may never have been anticipated by the drafters of 42 U.S.C. Section 1983, we find nothing in the language of that statute nor in the Supreme Court's Decisions thereunder which permits the recognition or nonrecognition of state action to be in any way governed by the nature of the Constitutional rights asserted in a complaint under Section 1983." *O'Neill v. Grayson County War Memorial Hospital*, 472 F. 2d. 1140, 1144 (6th Cir. 1973)

In applying the double standard, the various courts of Appeals have added a further requirement that not only must the state be involved in a symbiotic relationship with the otherwise private entity, but that the state must be involved with the very practice or action that is complained of. This extra requirement was first enunciated in *Doe v. Bellin Memorial Hospital*, supra. That opinion attempted to justify the extra requirement by drawing words out of context from *Burton v. Wilmington Parking Authority*. However, there is nothing to indicate that the Parking Authority in any way supported, required or urged its tenant to discriminate against black people.

If there is to be a double standard in our Federal Courts concerning the enforcement of Constitutional rights, then this Court should enunciate that standard clearly for all to hear. Logic dictates that if a hospital, school or other institution can discriminate against those women who desire to exercise their Constitutional right to an abortion, then that same institution or entity can discriminate against black people. Depending upon where one lives, such is not the case and such a state of affairs is extremely frustrating to those who seek out the Courts for help in obtaining their Constitutional rights. If the law is truly to be colorblind then this Court should put an end to the double standard.

Conclusion

For these reasons a Writ of Certiorari should issue to review the judgment and opinions of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Opinion Filed May 29, 1975

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

CIVIL ACTION NO. 74-2102.

JOHN C. GRECO

Plaintiff-Appellant

v.

ORANGE MEMORIAL HOSPITAL
CORPORATION et al.,

Defendants-Appellees.

Before GEWIN, BELL and CLARK,
Circuit Judges

GEWIN, Circuit Judge:

The plaintiff-appellant, Dr. John C. Greco, a licensed physician authorized to practice obstetrics and gynecology, joined the staff of the Orange Memorial Hospital in 1960. In early 1973 after the United States Supreme Court invalidated the Texas criminal abortion statute, the appellant began to perform elective abortions. Eight elective abortions were performed by Dr. Greco in Orange Memorial Hospital before the hospital's board of directors adopted a motion of the medical staff to prevent further use of the hospital's facilities for the performance of non-therapeutic abortions. Following the institution of this policy six of Dr. Greco's patients who desired non-therapeutic abortions were denied admission to the hospital.

Facts stipulated by the parties indicate that surgical proce-

dures technically indistinguishable from elective abortions are performed in Orange Memorial Hospital and that the hospital's facilities are adequate to accommodate patients seeking elective abortions. Dr. Greco filed suit against the Orange Memorial Hospital Corporation, its board of directors and medical staff, and the Commissioners Court of Orange County, seeking declaratory and injunctive relief, as well as damages, for their allegedly unconstitutional policy. Prior to trial the district court ordered the damage claim severed and held in abeyance pending resolution of the other issues presented. The court found the board of directors ultimately responsible for hospital policy and dismissed the medical staff from the case. Subsequent to the presentation of Dr. Greco's evidence the court dismissed the remaining defendants holding that absent a showing of "state action" the court was without the subject matter jurisdiction required by 42 U.S.C. § 1983 and the Fourteenth Amendment to hear the case.[1] We agree with the district court in all respects and affirm. The opinion of the district court is reported in 374 F.Supp. 227 (E.D.Tex. 1974).

Dr. Greco raises two questions on appeal: (1) whether the district court erroneously decided that the actions of the hospital staff and the board of directors did not constitute "state action", or "action under color of law"; (2) whether the district court erroneously dismissed the cause of action against the medical staff. The appellees present a cross specification of error contending that the district court erroneously found that Dr. Greco had standing to bring the suit.

Addressing first the question of standing, we find that in the circumstances Dr. Greco had standing to litigate on behalf of his patients who were allegedly deprived of constitutional rights by the Orange Memorial Hospital's restrictive abortion policy, and on his own behalf because of his individual economic and liberty interest. Dr. Greco's personal stake in this litigation is primarily his right to practice medicine free from the imposition of arbitrary restraints, and the physician's interest in the context of this case is inextricably bound up with the right to privacy of the patients seeking an abortion. The existence of such a personal interest in the controversy is assurance enough of the adversarial character of the litigation necessary to sharply

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1. See, Parish v. National Collegiate Athletic Association, 506 F.2s 1028, 1031 (5th Cir. 1975).

focus the issues for this court.[2] See Nyberg v. City of Virginia, 495 F.2d 1342, 1344 (8th Cir. 1974); Shaw v. Hospital Authority of Cobb County, 507 F.2d 625 (5th Cir. 1975); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); YWCA v. Kugler, 342 F.Supp. 1048, 1055 (D.N.J. 1972). See generally, standing to assert Constitutional Jus Tertii, 88 Harv.L.Rev. 423 (1974).

The difficult questions on this appeal are those presented by Dr. Greco. He asserts essentially that Orange Memorial Hospital and Orange County are engaged in a symbiotic relationship, that Orange County has delegated its authority to the hospital corporation, and that the hospital is performing a public function, all of which indicate that the hospital should be subject to constitutional restrictions. Dr. Greco takes specific issue with the district court's construction of Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972) and Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973) to the effect that he must show that Orange County is involved in the very activity challenged in order to prove "state action." He argues that the evidence shows the state to be a joint participant in the operation of the private entity and that the state is perforce involved in the challenged activity.

In order to provide the proper perspective for addressing these questions we must delve more deeply into the factual background of the Orange Memorial Hospital and, once ascertained, perceive the facts of this case in the context of the legal morass of the ever evolving state action doctrine.

The history of the hospital's creation was stipulated by the parties. In 1954 land on which the hospital is located was donated to Orange County by private individuals. In the same year county voters authorized the issuance of $1,762,000.00 in hospital bonds. The local money was combined with a Hill-Burton grant of $1,250,000.00 in order to erect the original hospital building. In later years more land was donated to the

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2. The district court stated its conclusion on the issue of standing as follows:

> This Court is in agreement with the reasoning of the Court in Young Women's Christian Association of Princeton, N. J. v. Kugler, that the plaintiff physician has standing to litigate any deprivations of the constitutional rights of his pregnant women patients. Further, he has standing to litigate on his own behalf because he has suffered some, albeit small, economic loss and because the hospital rule may infringe on his right to practice medicine.

374 F.Supp. at 232.

county by private individuals and the county commissioners, without the explicit approval of the voters, issued approximately $670,000.00 worth of hospital time warrants so that additions could be made to the original building. The county owns both the land and the building which houses the Orange Memorial Hospital. Orange County citizens pay eight and one-half cents of every tax dollar to retire the bonds and time warrants.

In 1957 Orange Memorial Hospital, under the auspices of the non-profit hospital corporation, opened its doors to the public. Daily operating expenses are assumed by the hospital corporation and paid with funds generated by the hospital's services. To-date income from patients has been sufficient to defray all expenses. The corporation leases the land and hospital building from the county for one dollar per year and is exempt from all taxation, state, local, and federal. The term of the lease between the county and the hospital corporation is for a period of 5 years, and the lease may be renewed for 5 year terms indefinitely. Under the provisions of the lease the hospital corporation agreed to the following: (1) to operate the hospital as a non-profit institution and to furnish to the general public medical and surgical care subject to such terms and regulations as the lessee may prescribe; (2) to carry out the assurances required of the lessor in order to obtain federal funds and to relinquish possession of the hospital in the event it fails to adequately comply;[3] (3) to have all equipment and supplies inventoried, in a manner approved by lessor, and to dispose of worthless, damaged, or worn out equipment only with the prior approval of the Commissioners Court; (4) to be responsible for the expense of the day to day operation and maintenance of the hospital; (5) to make additions to the hospital with the written consent of lessor and at its own expense; (6) to keep all

3. The Hospital Survey and Construction Act (Public Law 725, 79th Congress) Tit. 42 U.S.C.A. § 291 et seq. provides generally for conditions upon which federal assistance is available for the construction of hospitals. For example, § 291e requires that laborers engaged in construction of the facility be paid wages not less than those prevailing on similar work in the particular locality. No condition is imposed with respect to the performance or nonperformance of elective abortions.

Federal financial assistance does not bring an otherwise private facility within the parameters of 42 U.S.C. § 1983 and the Fourteenth Amendment. See, e. g., Barrett v. United Hospital, 376 F.Supp. 791, 800–01 (S.D.N.Y. 1974).

appropriate insurance in effect; (7) to submit an annual audit to lessor and to furnish any information which lessor feels is necessary to inform the people of Orange County about the operation and financial condition of the institution; (8) to accept indigent patients certified by the lessor subject to the prior obligation to receive emergency cases. The lessee is given an option to purchase the hospital during the term of the lease and and unlimited option to renew the lease for additional 5 year periods as indicated earlier. The lessor reserved the right through its County Health Office to advise the lessee that an indigent is being kept in the hospital for a longer period of time than necessary, and that the lessor shall no longer be liable for expenses. The lessor-county specifically indicates in the lease that the lessee "has undertaken to relieve lessor of the responsibility and expense of operating a hospital."

The lessee-Orange Memorial Hospital Corporation was chartered as a non-profit, tax exempt, private corporation for the purpose of supporting charitable and educational undertakings including the operation and maintenance of the hospital, and the general promotion of the health of the community. The corporation consists of life and advisory members. Life membership is obtained by contributing $1000.00 to the corporation. Any citizen and qualified voter of Orange County who owns taxable property may become an advisory member by attending the annual meetings of the corporation. The direction and management of the affairs of the corporation is vested in the board of directors composed of 9 persons. Five members of the board must be life members and four members are elected from the advisory group. The by-laws of the corporation do not precisely define the relationship between the board of directors and the medical staff but do indicate that the board is the ultimate authority in determining hospital policy. The board is authorized to receive and consider recommendations of the medical staff.[4]

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4. For example, Article IX §§ 1, 2, 9 of the Hospital Corporation's By-Laws provide that:

SECTION 1

The Board of Directors shall appoint a Medical Staff of the Orange Memorial Hospital Corporation which shall, subject to the approval of the Board of Directors of the Corporation, adopt its own By-Laws. Such By-Laws shall not be inconsistent with the By-Laws of the Corporation, and shall include a provision for review of decisions concerning

The district court correctly held that a private hospital is subject to the provisions of 42 U.S.C. §1983[5] and the Fourteenth Amendment[6] only if its activities are significantly affected with state involvement.[7] Section 1983 and the

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qualifications and privileges of members of the Medical Staff and applicants for membership, including the right of the individual practitioner to be heard upon request, at each step of the process.

SECTION 2

The Medical Staff shall have the authority to evaluate the professional competence of staff members, and applicants for staff membership; and shall be responsible for making appropriate recommendations to the Board of Directors concerning the appointment, reappointment, granting of privileges, and curtailment of privileges of members, and as appropriate, applicants for membership on the professional staff.

SECTION 9

The Board of Directors shall be kept informed of the recommendations generated from the Medical Staff's peer review of the clinical practice, and utilization review functions. The Chief of the Medical Staff shall be requested periodically (at regularly scheduled meetings of the Board of Directors) to provide the Board with a verbal briefing concerning these functions.

5. The Civil Rights Act of 1871 (42 U.S.C.A. § 1983) states in pertinent part:
   Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . . in an action at law, suit in equity . . ..

6. Section 1 of the Fourteenth Amendment states in pertinent part:
   No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

7. Two elements must be proved in order to recover under § 1983: (1) deprivation of a constitutional right by a defendant, (2) acting under color of law, See Smith v. Young Men's Christian Ass'n of Montgomery, 462 F.2d 634, 647 (5th Cir. 1972); Hathaway v. Worcester City Hospital, 475 V.2d 701, 705 (1st Cir. 1973), and discussion of Dr. Greco's standing to bring this suit, in text, *supra*. Generally speaking the label "state action" and "under color of law" are perceived as alternative ways of expressing the same legal principle. Note, State Action: Theories for Applying Constitutional Restrictions to Private Activity, 74 Col. L.Rev. 656, n. 4 (1974) (hereinafter cited as State Action: Theories); Parish v. National Collegiate Athletic Association, 506 F.2d 1028, 1031 n. 6 (5th Cir. 1975). Justice Brennan is of the view that "under color of law" is more restrictive than the concept of "state action." Adickes v. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142, 184–85 (1970)(opinion of Brennan, J.).

Fourteenth Amendment do not preclude invidious discrimination by private parties. Civil Rights Cases, 109 U.S. 3, 11, 3 S.Ct. 18, 21, 27 L.Ed. 835, 841 (1883).[8] The problem in state action cases is that demarcation of the spheres, public and private, is a dynamic process, and the boundaries between the two shift and are adumbrated by the various factual situations which are presented for review.[9] As the court in Burton v. Wilmington Parking Authority said, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[10]

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8. The Civil Rights Cases not only articulate the dichotomy between state and private action, but also illustrate the confusion which sometimes arises in the analysis of state action problems regarding the question of Congressional power to legislate against private discriminatory conduct. See generally, State Action, Congressional Power and Creditors' Rights: Burke and Reber and Essay on the Fourteenth Amendment, 46 S.Cal.L.Rev. 1005, 1011 (1973) (hereinafter cited State Action, Congressional Power and Creditors' Rights). For examples of decisions discussing the scope of Congressional power see, Griffin v. Brickenridge, 403 U.S. 88, 95 S.Ct. 1790, 29 L.Ed.2d 338 (1971); United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966).

9. See, e. g., James V. Pinnix, 495 F.2d 206, 209 (5th Cir. 1974); Wimbish v. Pinnellas Co., Fla., 342 F.2d 804(5th Cir. 1965). *Compare* Doe v. Bellin Mem. Hosp., 479 F.2d 756 (7th Cir. 1973) *with* Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974). See generally, State Action: Theories at 656–57.

   The concepts of state action developed primarily in cases involving racial discrimination. The broad pronouncements articulated by the courts in some of these decisions are in the process of being more precisely defined, particularly in litigation free from racial overtones. See, e. g., Jackson v. Metropolitan Edison Co., ---U.S.--, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); James v. Pinnix, 495 F.2d 206, 209 (5th Cir. 1974) ("Some state involvement in the *Reitman-Moose Lodge* sense may be present here but it is simply not enough, given the nonracial nature of the case, to constitute state action."). See also, Black, The Supreme Court 1966 Term; Foreward: "State Action", Equal Protection and California's Proposition 14, 81 Harv.L.R. 69, 70 (1967) (hereinafter cited as Supreme Court 1966 Term); State Action, Congressional Power and Creditors' Rights. *Compare*, The Reemergence of the "State Action" Requirement in Race Relations Cases, 22 Cath.U.L.R. 39 (1972).

10. 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed. 2d 45, 50 (1961).

    Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the

It is enlightening, however, to consult the substantial body of "state action" case law for illustrations of the kind and degree of state involvement which justify the imposition of Constitutional restraints upon an ostensibly private entity.

Generally speaking, questions of "state action" arise when the state has involved itself in the activity under scrutiny or when a private entity has of its own volition assumed a state or public function. See generally, State Action: Theories; State Action, Congressional Power and Creditors' Rights; State Action and the Burger Court, 60 Va.L.Rev. 840 (1974); Case Note, 43 Fordham L.Rev. 288 (1974); The Reemergence of the "State Action" Requirement in Race Relations Cases, 22 Cath.U.L.R. 39 (1972); Developments in the Law: Academic Freedom, 81 Harv.L.Rev. 1045, 1056-64 (1968). A state's involvement may be manifested in multifarious ways. For example, the state may sanction or seek to enforce the claims of private parties,[11] may give financial assistance to private institutions,[12] may regulate the activities of private organizations,[13] or may employ private parties to promote state interests.[14] On the other hand, the state may not be involved at all. A private party may assume a governmental character by participating in activities such as those described in Terry v.

Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "This Court has never attempted."

Id. (citation omitted).

11. See, e. g., Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Reitman v. Mulkey, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967); Brantley v. Union Bk. & Trust Co., 498 F.2d 365 (5th Cir. 1974).

12. See. e. g., Smith v. YMCA, 462 F.2d 634 (5th Cir. 1972); Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

13. See e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed.2d 627 (1972); Grafton v. Brooklyn Law School, 478F .2d 1137 (2d Cir. 1973).

14. See, e. g., Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956).

Adams[15] or Marsh v. Alabama.[16] The instant appeal involves some aspects of both state involvement and the assumption of a public function by private parties. Under neither approach do we feel that the circumstances warrant imposition of constitutional restrictions upon Orange Memorial Hospital.

Orange County gives the hospital corporation financial support to the extent that a publically owned building and the land upon which it is situated are leased for the nominal sum of one dollar per year. The hospital corporation is a non-profit, charitable, tax exempt, organization explicitly dedicated to maintaining the facility and to promoting community health care. Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) involved a somewhat similar but not identical situation. The Authority, in order to make bond financing of its parking facility practicable by ensuring income in addition to parking fees, entered into long term leases with commercial tenants, including the Eagle Coffee Shoppe. The Eagle Coffee Shoppe, at its own behest, adopted a policy of racial discrimination, refusing to serve blacks. The Court emphasizing the facts that the parking facility was publically owned, that the restaurant's premises constituted physically and financially integral parts of the State's parking project, that upkeep and maintenance of the building were public responsibilities, that the lease provisions enabled the State to demand that Eagle provide nondiscriminatory service, and that the restaurant was located in a building devoted to public purposes, found a degree of state participation in the Eagle's discriminatory action which was precluded by the Fourteenth Amendment.[17] The Court observed that the mutually beneficial relationship between the Authority and Eagle infused the respective projects with attributes of a joint venture.[18] Absent close scrutiny one might argue that Burton v. Wilmington Parking Authority controls the instant appeal. There are, however, significant differences in the two sets of circumstances.

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15. 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953).

16. 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946).

17. Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45, 51–2 (1961).

18. *Id.*

The most obvious distinguishing factor is that Orange Memorial Hospital is not accused of racial discrimination. The doctrine of state action developed primarily in the area of racial discrimination. See State-Action Theories at 657 and footnote 10, *supra*. The concepts developed in this area, explicitly supported by constitutional and legislative mandates, were necessarily broadly drawn in order to implement Congressional intent in circumstances of positive and frequent state obfuscation and delay. The potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in areas unaffected by racial considerations has led courts to define more precisely the applicability of the state action doctrine. See James v. Pinnex, 495 F.2d 206, 209 (5th Cir. 1974) and footnote 10, *supra*. See also Brantley v. Union Bk. & Trust Co., 498 F.2d 365 (5th Cir. 1974); Calderon v. United Furniture Co., 505 F.2d 950 (5th Cir. 1974); Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956); Blouin v. Loyola, 506 F.2d 20 (5th Cir. 1975); Grafton v. Brooklyn Law School, 478 F.2d 1137, 1142 (2nd Cir. 1973). *Compare*, Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938, 84 S.Ct. 793, 11 L.Ed.2d 659 (1964). The policy of the Orange Memorial Hospital Corporation does not impinge upon the rights of a racial group seeking admittance and treatment, but rather affects primarily only the internal affairs of the facility. A secondary effect of the corporation's policy is admittedly to discriminate against persons seeking to obtain and physicians desiring to perform elective abortions. We feel, however, that the interest of the hospital in ordering its internal administrative affairs outweighs the interest of the people disadvantaged in this case.

A second factor distinguishing the instant situation from that described in Burton v. Wilmington Parking Authority is also noted in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627, 638 (1972):

> [T]here is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton, where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was enabled to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose

to commercial lessees such as the owner of the Eagle Restaurant.

The symbiotic relationship in Burton v. Wilmington Parking Authority included an obligation on the part of the Authority to maintain and repair Eagle's premises. In addition the Authority provided the restaurant with heat and electricity. In contrast, the Orange Memorial Hospital Corporation is ultimately responsible for the daily maintenance, upkeep, and operation of the facility. The lease requires the lessee to maintain and operate the hospital at its own expense and to hold the lessor harmless from any liability incurred in operating the facility. The lessee is required during the term of the lease to provide adequate fire, tornado, and explosion insurance and in the event of any damage to use the proceeds to repair the hospital.

In addition to the absence of a physical relationship like the one found between the Authority and the restaurant in Burton v. Wilmington Parking Authority, there is also no showing of other "benefits mutually conferred" which allows us to characterize the hospital and the county as joint venturers. There are unquestionably indirect benefits accruing to Orange County by virtue of the corporation's operation of the hospital. As the lease states, the county is relieved of the expense and responsibility of operating a hospital. There is, however, no indication, as there was in Burton v. Wilmington Parking Authority that the benefits accruing to the county were directly attributable to the objectionable activities of a joint venturer. In *Burton* the financial success of the State's project depended at least in part upon the popularity and income of the Eagle Restaurant. The restaurant owners believed that a policy of racial discrimination was necessary in order to ensure the maximum volume of business and the Authority, in its own interest, acquiesced in this policy. In short, the intimate physical and financial relationship enjoyed by the Eagle Restaurant and the Parking Authority in *Burton* is not present in this case. The interpendence of the entities, so important to the decision in *Burton*, is absent here.

The independence of the Orange Memorial Hospital and Orange County is also reflected in the absence of a nexus between the county's involvement with the Hospital and the

Hospital's abortion policy presently under scrutiny. As the court said in Doe v. Bellin Memorial Hospital, 479 F.2d 756, 761 (7th Cir. 1973):

> There is no claim that the state has sought to influence hospital policy respecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits. Insofar as action of the State of Wisconsin or its agents is disclosed by the record, the State has exercised no influence whatsoever in the decision of the defendants which plaintiffs challenge in this litigation.

In fact the lease between Orange County and the Hospital Corporation explicitly provides that the *lessee* shall prescribe the terms and regulations of medical care given in the facility. The record affirmatively shows that the county officials neither directly nor indirectly participated in the formulation of the presently disputed hospital policy. See text, *infra.* See also, Jackson v. Metropolitan Edison Co.,––U.S.––, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627, 639 (1972); Blouin v. Loyola, 506 F.2d 20 (5th Cir. 1975); Driscoll v. International Union of Op. Eng., Local 139, 484 F.2d 682 (7th Cir. 1973); Pendrell v. Chatham College, 370 F.Supp. 494 (W.D.Pa. 1974).

Finally, we note that in contrast to the situation in Burton v. Wilmington Parking Authority, the Commissioner's Court of Orange County retained no power to amend the hospital corporation's decision to prohibit the performance of elective abortions. The lease explicitly provides that the

> Lessee agrees to operate the hospital situated on the above described property for the duration of this lease as a non-profit institution, and thereby furnish to the general public medical and surgical care and treatment, *subject to such terms and regulations as Lessee may prescribe.* (emphasis added)

There is no evidence that in acquiring federal funds or in leasing the hospital facility the corporation ever accepted a condition relating to the performance or non-performance of abortions. Doe v. Bellin Memorial Hospital, 479 F.2d 756, 761 (7th Cir. 1973). The Parking Authority in *Burton,* on the other hand, was specifically obligated to operate in a non-discriminatory manner.

We would be less than candid not to acknowledge Orange County's limited involvement and interest in the hospital facility. The lease does obligate the hospital corporation to

serve the general public, to admit indigent patients, to abide by the provisions of the Hospital Survey and Construction Act, to provide the county auditor with a yearly financial report (and any other information requested), and to obtain county approval before disposing of hospital property. These factors are not unusual in the lessor–lessee relationship. The Court in Jackson v. Metropolitan Edison Company, ––U.S.––, 95 S.Ct. 449, 453, 42 L.Ed.2d 477, 484 (1974) fairly summarizes Orange Memorial Hospital's status:

> It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.

We do not feel that the nature of Orange County's involvement with the hospital facility justifies a finding of state action.

Dr. Greco's assertion that the instant appeal is governed by Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) and Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) is also ill-founded. Recent decisions have more explicitly defined the applicability of *Marsh* and *Terry* stating that a business is not a state actor merely because the enterprise is affected with a public purpose. See Jackson v. Metropolitan Edison Co., ––U.S.––, 95 S.Ct. 449, 42 L.Ed.2d 477, 485 (1974); Central Hardware Co. v. NLRB, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed.2d 122, 128–29 (1972); Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972). In *Marsh*, Gulf Shipbuilding Corporation held title to all the land in the "company town" and assumed the responsibilities of providing traditional municipal services, including police protection, to the residents of the town. *Terry* involved a duplicitous county primary scheme designed to disenfranchise black voters. No such peculiarly governmental function has been assumed by the Orange Memorial Hospital Corporation. Lloyd Corp. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131, 143 (1972).

In summary, we find that Orange County is not sufficiently connected with the Orange Memorial Hospital Corporation's activities to imbue those actions with the attributes of the state. The involvement of the County is not sufficiently related to the

corporation's decision to prohibit elective abortions to justify the imposition of Constitutional restrictions upon the daily business of the hospital.[19] Absent a charge of racial discrimination we are disinclined to press the state action doctrine and all that it entails into the internal affairs of a hospital.[20] Moreover we do not perceive Orange Memorial Hospital as an entity exercising peculiarly governmental functions which

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19. We are not willing to hold that the district court erred in reaching the following conclusion:

> In the present case the Court finds that the Orange Memorial Hospital is a private hospital operated by the Orange Memorial Hospital Corporation, which is a non-profit corporation. The evidence supports the conclusion that Orange County and the State of Texas have never sought to regulate or influence the medical policy to be followed within the hospital and in particular with respect to the performance or non-performance of elective abortions therein. The County and State have remained completely neutral on the medical policy of the hospital. Therefore were not acting under color of state law.

374 F.Supp. at 233.

20. In an entirely different context this court sitting en banc has recently dealt with the state action concept in Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975). In *Fitzgerald* a state prisoner petitioned for a writ of federal habeas corpus claiming that his state trial was unfair, that he was denied the effective assistance of counsel and that state action was involved. He buttressed his claims with the assertion that the adjudication of state criminal cases is a vital and structured function of the state. He argued that state action was involved because he was prosecuted by a state prosecutor, in a state court, before a state judge in a state courthouse before a jury selected according to state law and paid by the state. Indeed he asserted that from arrest to ultimate release he was in the hands of a state operated system and that even his privately retained counsel was a crucial part of the state adjudicatory machinery. These facts were undisputed. We succinctly concluded:

> [the] conclusion that the Fourteenth Amendment state action requirements is satisfied in every ineffectiveness of retained counsel case "because the state adjudicatory machinery is inextricably intertwined with the conduct of an accused person's retained attorney" reaches far too far.

505 F.2d at 1337..

The complaint of Dr. Greco is important and we have tried to give his arguments and allegations careful consideration. However, all of his assertions relate only to his alleged right to conduct a certain type of surgical procedure at one specific hospital. On the other hand, Fitzgerald's petition for the Great Writ presented an appealing plea for liberty which had been abridged by a state prison sentence confining him to a state prison for a substantial number of years. The claims of Dr. Greco are not nearly so ominous as those of Fitzgerald.

might, in the absence of constitutional restrictions, be employed in derogation of a citizen's fundamental rights.

For the reasons stated we affirm the judgment of the district court.[21]

Affirmed.

CLARK, Circuit Judge (concurring):

Despite Judge Gewin's forceful opinion, I remain convinced that Orange County and this hospital enjoy precisely the sort of symbiotic relationship defined in *Burton*. To their mutual advantage, the county furnished land, buildings and facilities while operation and supervision by the hospital board and medical staff provided the general county community with health services and provided priority medical care for the county's indigent citizens.

However, I still come down on the side of affirming the dismissal because the particular claim asserted is not actionable. *Doe* and *Roe* teach that a state cannot forbid certain types of abortions, but they do not create any duty on Orange County's part to furnish facilities for such operations. Just as the Eagle Coffee Shop in Wilmington's parking garage could not have been forced to furnish kosher food or serve fish on Friday, so the Orange County Hospital cannot be compelled to allow its facilities to be used for elective abortions. *Contra*, Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974), and Nyburg v. City of Virginia, *supra*

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21. Dr. Greco's contention that the medical staff was improperly dismissed from the suit is, therefore, moot.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74–2102

D. C. Docket No. 73–159

JOHN C. GRECO,
Plaintiff–Appellant,

versus

ORANGE MEMORIAL HOSPITAL CORPORATION, ET AL.,
Defendants–Appellees.

Appeal from the United States District Court for the
Eastern District of Texas

Before GEWIN, BELL and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff–appellant pay to defendants–appellees, the costs on appeal to be taxed by the Clerk of this Court.

May 29, 1975

CLARK, Circuit Judge, concurring.

Issued as Mandate: JUL 7, 1975

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No. 75-432

In the

Supreme Court of the United States

OCTOBER TERM, 1975

JOHN C. GRECO,

Petitioner,

v.

ORANGE MEMORIAL HOSPITAL CORPORATION, ET AL,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the 5th Circuit (Appendix 1 of Petition) is reported at 513 F.2d 873 (5th Circuit 1975).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this cause is moot since Petitioner is no longer a member of the hospital medical staff and, consequently, is not entitled to the use of its facilities.

2. Whether in denying Petitioner the unqualified right to perform non-therapeutic abortions in Respondent's facility, Respondent was acting under color of State law so far as to confer federal jurisdiction under 42 U.S.C. 1983.

3. Whether the individual Respondents were correctly dismissed by the District Court for want of subject matter jurisdiction, there being no diversity of citizenship between the Plaintiff and Defendants.

4. Whether the Petitioner had the requisite standing to maintain this action.

STATUTE INVOLVED

42 U.S.C. 1983 printed in Appendix A.

STATEMENT

This case commenced in the District Court as a suit for declaratory judgment, the Petitioner contending that a hospital rule promulgated by Orange Memorial Hospital prohibiting the performance of non-therapeutic abortions was unconstitutional under the 14th Amendment to the Constitution of the United States and violated Title 42, U.S.C., Section 1983.

The Complaint also sought money damages from various members of the hospital's medical staff for conduct alleged to interfere with Petitioner's First Amendment rights and legitimate economic interests. The count for damages was dismissed by the District Court for lack of subject matter jurisdiction, since it plainly appeared from the allegations that this phase of the Complaint

was basically a personal tort claim and there was not complete diversity of citizenship between Petitioner and all of the Respondents.

The District Court proceeded to trial solely on the issue as to whether the hospital rule pertaining to abortions violated the Civil Rights Act or otherwise infringed upon Petitioner's Constitutional rights. This question was not reached, however, since the District Court concluded from the evidence that the hospital was not acting under color of state law with respect to said rule and, consequently, the Complaint was dismissed for want of federal jurisdiction.

Subsequent to the action of the District Court, an administrative hearing was held by the hospital on charges that Petitioner had violated a hospital surgical rule pertaining to entry into the peritoneal cavity of a patient without seeking the assistance of another surgeon as required by the rule. Pursuant to these proceedings, Petitioner was on February 21, 1975, dropped from the medical staff of the hospital.

ARGUMENT

I.

Whether this cause is moot since Petitioner is no longer a member of the hospital medical staff and, consequently, is not entitled to the use of its facilities.

As set forth in the affidavit of Willie C. Magness (Appendix B), Administrator of the Orange Memorial Hospital, Petitioner is no longer a member of the medical staff and would not be entitled to admit patients to the hospital for any surgical procedure including non-therapeutic abortions. Since the application for certiorari seeks to review the lower court's determination with regard to the

enforceability of a hospital rule prohibiting non-therapeutic abortions and seeks relief in the form of a declaratory judgment and injunction, this cause has become moot since any such action could not possibly afford any relief to Petitioner or his patients since he would not be permitted to use the hospital facilities for any purpose.

The granting of the application would, consequently, be futile and any action of the Court would constitute an advisory opinion.

II.

Was Respondent hospital acting under color of state law so as to confer federal jurisdiction under 42 U.S.C. 1983.

In BURTON VS. WILMINGTON PARKING AUTHORITY, 365 U.S. 715 (1961), this Court stated:

> "Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance." 365 U.S. 715, 722.

This was the responsibility of the Dsitrict Court, which it discharged after hearing all of the evidence pertinent to the operation of the hospital. In an elaborate opinion containing its findings of fact and conclusions of law, the Court, "sifting facts and weighing circumstances" found that the evidence failed to establish that the hospital was acting under color of state law with respect to the rule and the enforcement thereof. See GRECO VS. ORANGE MEMORIAL HOSPITAL CORPORATION, 374 F. Supp. 227.

Unless clearly erroneous, this determination by the trial court should not be disturbed. Respondents, therefore, respectfully submit that this case does not present a question of national importance but is merely a case wherein Petitioner failed to carry his burden of proving facts sufficient to persuade the District Judge that he had jurisdiction to consider the constitutional claims.

But, even if the Court is authorized to make an independent determination of the facts presented by this record, Respondents respectfully submit that there was not that degree of state involvement sufficient to bring Respondents' actions within the ambit of the Civil Rights Act.

The problem is admitted a difficult one. However, other Courts which have considered it have concluded that the inquiry must be focused upon the existence or non-existence of state involvement with respect to the activity under challenge. MOOSE LODGE NO. 107 VS. IRVIS, 407 U.S. 163 (1972); DOE VS. BELLIN MEMORIAL HOSPITAL, 479 F.2d 756 (7th Circuit 1973).[1]

The evidence in this case is conclusive on one point and that is that Orange County, whatever else might be said about its contacts with the hospital operation, had absolutely nothing to do with medical policy and particularly with such policy as it pertained to the performance of abortions within the hospital. As to this subject, the county was completely neutral, and in fact under

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[1]The "state action" concept has developed for the most part in cases involving racial discrimination where it has been given a quite broad application. COOPER VS. AARON, 358 U.S. 1 (1958); BURTON VS. WILMINGTON PARKING AUTHORITY, 365 U.S. 715 (1961); EVANS VS. NEWTON, 382 U.S. 296 (1966). Outside the areas of invidious discrimination, the concept has been applied more narrowly. MOOSE LODGE NO. 107 VS. IRVIS, 407 U.S. 163 (1972); JACKSON VS. METROPOLITAN EDISON COMPANY, ... U.S. ....., 42 L.Ed. 477 (1974). There are two reasons for this. The discrimination cases reflect an intense concern of the courts to implement national policy with respect to eliminating all vestiges of unequal treatment on account of race alone. In this area, the state has a duty not merely to stand aside but to affirmatively act to eliminate such discrimination in areas committed to its responsibility. GREEN VS. COUNTY SCHOOL BOARD, 391 U.S. 430 (1968); SWANN VS. BOARD OF EDUCATION, 402 U.S. 1 (1971). Secondly, the challenged conduct in cases not involving racial discrimination generally is motivated by values which are themselves entitled to constitutional protection. JACKSON VS. METROPOLITAN EDISON COMPANY, supra. See DOE VS. BOLTON, 410 U.S. 179 at 197.

its lease had no right to influence or otherwise interfere with any medical policy established by the hospital. The situation is identical to that existing in DOE VS. BELLIN MEMORIAL HOSPITAL, supra, wherein upholding a hospital rule identical to that of Respondents, the Court stated:

> "There is no evidence * * * * that any condition related to the performance or non-performance of abortions was imposed upon the hospital. Unlike the fact situation in Simkins vs. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1953), * * * * this record does not reflect any governmental involvement in the very activity which is being challenged."
>
> * * * *
>
> "Nor do we believe that the implementation of defendant's own rules relating to abortions is action 'under color of' state law within the meaning of Sec. 1983. The State of Wisconsin is not a beneficiary of those rules and can not be characterized as a 'joint participant' in their adoption or enforcement. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715, 724-725, 81 S. Ct. 856, 6 L.Ed.2d 45. There is no claim that the state has sought to influence hospital policy respecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits. Insofar as action of the State of Wisconsin or its agents is disclosed by the record, the State has exercised no influence whatsoever on the decision of the defendants which plaintiffs challenge in this litigation." (479 F.2d 761).

Nor does there exist here the symbiotic relationship between the county and the hospital found existing in BURTON VS. WILMINGTON PARKING AUTHORITY, supra. Although the land upon which the hospital was built was furnished by the county and construction funds obtained from either the county or the federal government, the hospital is not part of a governmental project nor does the financial success of any government operation depend upon the medical policy pursued by the hospital. The

hospital is a self-sustaining medical facility with an operating budget of approximately $4.4 million. None of these funds are supplied by any government entity (Record, Volume 2, Pages 42, 78).

The record in this case does not reflect any governmental involvement in the abortion policy of the hospital, nor are Orange County and the hospital so intertwined as to make them joint participants within the meaning of BURTON VS. WILMINGTON PARKING AUTHORITY, supra. For these reasons, the application for certiorari should be denied.

III.

The individual Respondents were correctly dismissed by the District Court since there was no diversity of citizenship between the Plaintiff and all of the Defendants.

As noted above, the Petitioner jointed numerous individual members of the hospital staff and Board of Directors as party defendants, asserting that they were individually liable for damages because of their willful and malicious conduct in seeking to punish the Petitioner for his views. The court dismissed this aspect of the case on the grounds that insofar as the allegations pertained to hospital policy, such policy was the sole preserve of the Board of Directors, and insofar as such allegations stated a cause of action in tort, there was not the requisite diversity of citizenship to confer jurisdiction upon the Federal Court.

The hospital By-Laws make it clear that the Board of Directors had the sole policy-making power in the hospital. Although the medical staff is delegated administrative functions, all of its decisions are subject to approval by the Board of Directors and, in fact, the abortion policy at issue here, although formulated by the medical staff, was submitted to and approved by the Board of Directors. Of course it may be assumed that the recommendations

of the medical staff would be given great weight and would not be lightly disregarded, but this does not alter the fact that the responsibility for the final decision reposes not in the medical staff or the individual members thereof but in the duly elected governing Board of the hospital.

Accordingly, taking the Petitioner's allegations as true for the purposes of the Motion to Dismiss, he merely stated a cause of action for a tortious interference with an economic pursuit, a claim over which the Federal Court had no jurisdiction.

IV.

The Petitioner does not have standing to maintain this action.

Respondents accept the ruling in DOE VS. BOLTON, 410 U.S. 179 (1973) that a patient seeking an abortion in the hospital would have the necessary standing even if the pregnancy had terminated before the case was heard. Likewise, Respondents concede that a phsyician might possibly have standing to sue if he were threatened with meaningful sanctions for disobeying the rule. As the court observed in BOLTON:

> "The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions.
>
> "The physicians-appellants, therefore, assert a sufficiently direct threat of personal detriment." 410 U.S. 179, 188 (1973).

In the BOLTON case the physcians had standing to attack the statute because it was aimed at them, and they were directly threatened by it.

But here, it is important to consider that the hospital rule in question does not directly operate against Dr. Greco at all. It contains no sanctions, and none have been attempted with respect to

Dr. Greco even though he has sought admissions for elective abortions after the adoption of the rule.

The hospital rule merely operates as an admission policy whereby pregnant women desiring to use the hospital facilities are prohibited from doing so if the purpose is to obtain a non-therapeutic abortion.

On facts closely similar to these, the court in COREY VS. CITY OF DALLAS, 492 F.2d 496 (5th Cir. 1974) held that an owner of a massage parlor lacked standing to attack an ordinance making unlawful the administration of a massage to any member of the opposite sex.

Noting that as a general proposition a person may not assert constitutional rights of third parties, TILESTON VS. ULLMAN, 318 U.S. 44 (1943), the court proceeded to determine whether the massage parlor owner fell within the exception to the rule which provides that a litigant may assert the rights of third parties if it would be difficult or impossible for such third parties to raise those rights themselves. Cf. BARROWS VS. JACKSON, 346 U.S. 249 (1953), PIERCE VS. SOCIETY OF SISTERS, 268 U.S. 510 (1925). The court held that the exception did not apply because the ordinance in question was aimed at those who administered massages, and if these persons were ever prosecuted under the statute, they would be free to assert their own equal protection claims. Since the statute was not aimed at the owner, as he could not be prosecuted unless he participated in the prohibited conduct, he had no standing to assert the rights of other persons who might be affected by the statute.

In the instant case, it is clear that the hospital rule can only be applied with respect to patients seeking non-therapeutic abortions. As the record here demonstrates, it has been the patients seeking

admittance that have felt the impact of the rule, and whatever effect the rule has on Dr. Greco is derivative of that application.

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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707 Beaumont Savings Bldg.
Beaumont, Texas 77701
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By _____
Attorneys for Respondents

PROOF OF SERVICE

I, L. W. Anderson, attorney for Respondents and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copy of the foregoing Brief in Opposition to the granting of a Petition for Writ of Certiorari on Mr. James R. Weddington, 709 W. 14th Street, Austin, Texas, 78701, by mailing three copies thereof, postage prepaid and properly addressed on this 17 day of October, 1975.

_____

APPENDIX A

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

APPENDIX B

STATE OF TEXAS }
COUNTY OF ORANGE }

BEFORE ME, the undersigned authority, on this day personally appeared Willie C. Magness, known to me to be the person whose name is subscribed hereto, and after being by me duly sworn did depose and say that he is the administrator of the Orange Memorial Hospital and is duly authorized to make this affidavit; that pursuant to the by-laws of the Orange Memorial Hospital Corporation, an administrative hearing was held pursuant to which on February 21, 1975, the staff privileges of Dr. John C. Greco were not renewed by said hospital; that Dr. John C. Greco is not now a member of the medical staff of said hospital and accordingly is not permitted to use the facilities of said hospital for the treatment of patients; that the attached Exhibit A is a true and correct list of all physicians presently enjoying staff privileges in Orange Memorial Hospital.

WILLIE C. MAGNESS
Willie C. Magness

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on this the 8th day of October, 1975.

JOYCE F. WILKINSON
Notary Public,
Orange County, Texas

STAFF PHYSICIANS

EXT. #	NAME	CALL #	ADDRESS - OFFICE	OFFICE #	HOME #
283	Allen, Rollie E.	3	1307 W. Park	883-9341	886-3291
230	Barnes, J. E.	7	1005 Green	883-3579	886-8355
293	Bennett, David	27	801 W. Park	883-3752	883-3928
219	Bryant, Wm. W.	2	O.M.H.	Ext. #219	883-4056
282	Cleaves, Wilbur R.	23	1303 Park	883-1312	886-1011
285	Cloud, James P.	38	933 — 12th St.	883-8385	886-3266
303	De Bellis, Joseph	12	1309 W. Park	883-6100	886-4433
286	Eastman, Geo. L.	24	1001 W. Elm	886-3303	886-3190
	Fisette, Rod J.	34	235 Roberts, Bridge City	735-2487	883-7217
242	Griffin, O. R.	58	O.M.H.	Ext. #242	883-5823
287	Harris, M. F.	18	1118 N. 6th	883-3811	883-5376
284	Ingram, Robert A.	16	908 — 12th St.	886-2686	886-2859
203	Jones, J. B.	5	2607 Western	886-4407	735-4591
230	Kee, Robert C.	69	1005 Green	883-3579	883-4200
210	LeBlanc, Nolan J.	17	405 — 9th	886-4242	886-4922
	Merwin, Ralph C.	35	2531 Western	883-2334	883-4741
211	Pearce, H. Wynne	59	707 W. Main	883-4433	883-2536
297	Pollock, D. H.	19	803 W. Park	883-9402	886-2504
301	Pretz, E. C.	89	1406 W. Park	886-2935	886-4858
212	Stuntz, Homer C.	6	1214 — 16th	883-4796	883-8828
308	Sur, Sudha	4	306 — 10th	886-3030	886-1560
245	Watson, A. R.	57	O.M.H.	Ext. #245	883-9262
282	Williams, Howard C.	56	1303 W. Park	886-1313	886-2123
310	Young, Benjamin C.	68	Pinehurst Clinic	886-3633	886-4661

ACTIVE COURTESY STAFF

	Hale, Mary Lou	125	409 — 9th	883-4843	886-7792
289	Stuntz, Billie J.	67	1214 — 16th	883-4796	883-8828

CERTIFIED LIST OF ACTIVE MEDICAL STAFF
OF ORANGE MEMORIAL HOSPITAL CORPORATION,
ORANGE, TEXAS AS OF OCTOBER 8, 1975.

Dr. Ralph C. Merwin
Answering Service: 886-4433
Groves Hospital 962-5730

Dr. Benjamin C. Young
Answering Service: 735-2248

Dr. Barnett Page #126

STATE OF TEXAS
COUNTY OF ORANGE

JOYCE F. WILKINSON
Notary Public in and for
Orange, Orange County, Texas